Local Resistance and Criminal Law Reform

Author : Jennifer Chacón

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Trevor Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 **Fla. St. U. L. Rev. __** (forthcoming 2018), available at SSRN.

Two important law reform conversations are taking place on largely parallel tracks. One is a conversation about criminal justice reform. The other is a conversation about immigration enforcement. Occasionally, those conversations overlap, but for those who work at the intersection of criminal and immigration law, one source of surprise is how rarely this is the case.

Many of the arguments made in support of criminal justice reform forward apply in the immigration context as well. In both spheres, we see racial disproportionality in enforcement, the inability of criminal punishment to deter conduct driven by unaddressed root causes, and the mounting social costs of punitive systems that needlessly separate families and sunder social networks. In both arenas, private companies profit from and lobby for policies that increase incarceration, surveillance and new-widening rehabilitative programs. And yet the immigration enforcement system—and particularly its racial dimensions—are naturalized and normalized in ordinary political discourse. Conversations around immigration enforcement sound like the conversations about criminal enforcement in the mid-1990s (or in the White House now), with a common-sense consensus, against all evidence, that the nation needs to nurture and expand an expensive, discriminatory and dehumanizing system of enforcement. In his article *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, Trevor Gardner deftly shows how useful it is to integrate these conversations, particularly because the structure of immigration enforcement that the federal government has created over the past ten years essentially ensures that reform efforts aimed at one of these systems cannot succeed completely without reform to the other. This is perhaps not the primary point of Gardner's article, which is more centrally concerned with developing a theory of appropriate sub-federal resistance to federal criminal enforcement overreach. But the article manages to shed light on a broader range of questions than Gardner takes on.

Gardner's primary goal is to distill an argument in support of instrumental sub-federal resistance to federal overreach to achieve the goal of criminal justice reform. He first describes the steady increase in federal power over sub-federal criminal enforcement efforts that has taken place over the last forty years. He then presents what he calls a "process model of criminal justice reform." He describes the process has having four stages. In short, the four steps are: abstention, nullification, mimicry, and abolition. The process is described as linear, but not inevitable; Gardner acknowledges the possibility of events that will disrupt the process.

The first step in the process model is abstention; the sub-federal government chooses to abstain from participation in a federal enforcement initiative. This power of states (and localities) to abstain from enforcing federal regulatory programs is rooted in the Tenth Amendment. Gardner illustrates this step using examples from the "immigration sanctuary movement," in which various states and localities declined federal invitations and exhortations to expend their own resources to assist in identifying and detaining immigrant residents of interest to federal immigration enforcement agencies.

In the second stage of Gardner's process model, "the act of abstention effectively nullifies the federal initiative within that particular jurisdiction." Staying with the immigration sanctuary example, Gardner

reveals how each major cities' abstention from cooperative enforcement requests substantially limited the federal government's immigration enforcement efforts. As more and more cities enacting non-cooperation policies (perhaps evincing Gardner's step three: mimicry), the widespread nullification pushed the Obama administration to revise and narrow its enforcement policies. This never reached the level of full federal abolition, but the administration did scale back the Secure Communities program and replaced it with the Priority Enforcement Program, which involved a greater degree of collaboration and negotiation with local law enforcement. (Of course, as Gardner notes in his introductory section, his process model does not necessarily proceed in linear fashion in all cases, and that has been true in the area of immigration enforcement. The Trump Administration revived the Secure Communities program and scrapped the more cooperative PEP model. But this has only prompted more localities to abstain and nullify, with a significant dampening effect on federal enforcement efforts.)

Third, after abstention and nullification, other jurisdictions mimic the choice to abstain, widening the scope of nullification. To illustrate this process of mimicry, Gardner uses the example of section 908 of the Patriot Act, which required state and local officials to be trained in intelligence gathering in the course of their duties and instructed the US Attorney General, in coordination with the Central Intelligence Agency, to train police in the identification, circulation, and interpretation of foreign intelligence data. Numerous towns and cities in New England—and later, elsewhere—responded by passing ordinances in opposition to the measure that cited civil liberties concerns. Gardner argues that as more and more localities enacted these ordinances, their work served as a cultural recoding. Localities offered new cultural frames through which to understand notions of public security, and in so doing, they laid the groundwork for broader systemic reform.

The final step in Gardner's process model is abolition. At this stage, the federal government, "upon recognizing the scope of enforcement nullification and a corresponding challenge to its own credibility regarding the issue of public security, may choose to abolish the policy underlying the opposed initiative." The cleanest example of this is the repeal of Prohibition which Gardner unpacks. He also notes that federal enforcement policy around marijuana laws has not moved toward full abolition, but suggests that such a move is possible.

The final part of Gardner's paper offers his theoretical intervention. To mediate between William Stuntz 's extremely pessimistic view of the federal role in criminal justice policy and Stephen Schulhoffer's responsive, pessimistic take on local criminal justice policy, Gardner advocates for instrumentalist—as opposed to ideological—sub-federal resistance. Gardner first notes the limitations of "local" criminal justice policy. Drawing on the work of Evi Girling and other criminologists, he acknowledges that "[l]ocal sensibilities regarding crime had less to do with local criminal activity and more to do with national crime politics and the criminal enforcement campaigns that flowed from these politics." Local crime policies generally are responsive not to local conditions but to local understandings of received, packaged narratives about national and international threats. To remedy this, Gardner argues for local policies that reflect "healthy" sub-federal skepticism toward the "federal public security agenda" coupled with "more local democratic accountability" to impede unwanted, sub rosa participation of local actors in unpopular federal enforcement schemes.

Gardner acknowledges that a systemic tolerance for local skepticism could also lead to breakdowns in enforcement around environmental protection and civil rights, but he suggests that the federal government has the tools to avoid this problem. He uses the Department of Justice litigation against Sheriff Joe Arpaio as an example, noting that "in the same political moment in which cities and counties passed immigrant sanctuary policies in an effort to aggressively oppose police participation in the enforcement of federal immigration law, the federal government successfully challenged Sheriff Arpaio [for the civil rights violations he perpetrated in his excessive immigration enforcement campaign] in federal court." This example does illustrate the important point that the federal government has the

oversight tools to curb some police misconduct. But it is important to acknowledge that such resources are limited and that many abusive officials were not prosecuted in this period. Only the most egregious actors—or those in spaces where local advocates are mobilized and heard—are likely to get the kind of federal attention that was lavished on (the now-pardoned) Sheriff Joe. And as Gardner's own examples illustrate, each locality has the capacity effectively to nullify certain enforcement efforts that it views as undesirable, and it seems unlikely that the federal government can corral all of these actors through costly litigation, even assuming that doing so is a federal priority.

Ultimately, it is not clear that Gardner's answers to the fears of localism are wholly reassuring. But his paper is important for its contribution to thinking about the process by which localities shape criminal (and immigration) law and drive law reform. In particular, his insight into how local opposition can "recode" national narratives around public security really helps to make sense of the significance and the mechanisms of contemporary local enforcement resistance.

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